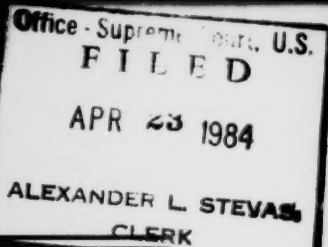


83 - 1723

No.



IN THE
Supreme Court of the United States

OCTOBER TERM 1983

PRINCE WILLIAM COUNTY, VIRGINIA, *et al.*
Petitioners

v.

TERRELL DON HUTTO, *et al.*
Respondents

**Petition for a Writ of Certiorari to the
United States Court of Appeals for
the Fourth Circuit**

JOHN HOLLAND FOOTE
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Counsel for Petitioners
Prince William County and
Sheriff C.A. Rollins, Jr.

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit misapplied *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in holding that the subjective good faith of the individual members of the Virginia State Board of Corrections and the Director of the Department of Corrections immunized them from joint liability with Prince William County, Virginia, for the incarceration of inmates in an unconstitutional County jail, where those officials knew of the substandard conditions of confinement, knew that they alone could remedy those conditions, and failed to act despite repeated requests for assistance.

THE PARTIES

The petitioners in this case are Prince William County, Virginia, a political subdivision of the Commonwealth of Virginia, and its Board of County Supervisors and Sheriff at the time of the institution of this action, Eileen Stout Barnes, Donald E. Kidwell, James J. McCoart, G. Richard Pfitzner, Joseph D. Reading, Kathleen K. Seefeldt, Donald L. White, and Sheriff C. A. Rollins, Jr.¹

Inmate respondents, originally plaintiffs below, are Crayton E. McElveen, Geary Lee Jamison, Julia Phillips, Larry Eugene Collins, Richard Murray, Jerry Michael Collins, Jeffrey Proctor, Charles Cuniff, Kelly Roach, Milton Jackson, Westley Blackburn, Bernard R. Richardson, William Edward Parker, James Edward Parker, James Dodson, Charles Scarpone, Buddie Spicer, Matthew L. Wright, Larry H. Shane, Joseph Deans, Jr., Eric Lee Backherms, and Timothy Wayne Orehowsky, all former inmates of the Prince William County Jail.

¹ Since the inception of this case in 1982, Mrs. Barnes has been succeeded by Edwin C. King, Mr. McCoart by John J. Jenkins, Mr. White by Guy Anthony Guiffre, and Sheriff Rollins by Wilson C. Garrison.

This case was also certified as a class action, including all inmates, whether convicts or pre-trial detainees, incarcerated from August 1, 1980, to January 22, 1982. The class comprises approximately 6,800 people.²

The State respondents are Terrell Don Hutto, formerly Director of the Virginia Department of Corrections, and the individual members of the Board of Corrections at the time this action was instituted, Sidney Parker, Joseph Benedetti, Donald Huffman, JoAnn Digennaro, Norvell K. Robinson, William P. Kanto, Stephen D. Rosenthal, Arnold J. Smith, and John W. Williams, III. These parties are present solely in their individual capacities, having been dismissed from this case in their official capacities prior to trial.

² The inmates are technically denominated respondents in accordance with Rule 19 of the Rules of this Court. This petition, however, challenges only the lower courts' treatment of petitioners' claims against the respondent state officials. Liability to the inmate class has not been challenged. Thus, reference throughout the petition to the "respondents" is reference to the state officials involved.

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**Petition for a Writ of Certiorari to the
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the Fourth Circuit**

OPINIONS BELOW

The memorandum opinion of the district court denying the County's cross-claim against the State Defendants (Pet. App. 3a-4a)³ is unreported. The opinion of the court of appeals (Pet. App. 5a-13a) is reported at 725 F.2d 954.

JURISDICTION

The judgment of the court of appeals was entered January 26, 1984. Pet. App. 13a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

³ References to Pet. App. are to the appendix to this petition.

STATUTES INVOLVED

1. 42 U.S.C. 1983 provides:

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. Sections 53-19.17, 53-129, 53-134, and 53-135.1 of the Virginia Code Annotated as they were in effect at all times relevant to this petition, are set forth in full in the appendix hereto. Pet. App. 17a-18a.

STATEMENT

1. The old Prince William County Jail was, by 1978, a terrible place to be imprisoned.⁴ It was unclean and understaffed. Most of all, it was badly overcrowded. Designed in the 1950's to hold thirty inmates, by that year it averaged more than twice that number, and inmate population steadily increased. By 1980 conditions were worse yet, and by early 1982 the jail routinely held over one hundred inmates. Overcrowding produced concomitant deficiencies. There was no place for exercise, and no capacity to do more than perfunctory classification of inmates. Violence was epidemic, and at least one male inmate was sexually assaulted. The jail was simply inadequate to the needs of a fast growing county.

⁴ As noted below, the old county jail was closed in April 1982, shortly after the liability trial and before the damages trial, when the new Prince William—Manassas Regional Adult Detention Center was opened.

Suit challenging these and other conditions was brought by one then-current and one former inmate in a proceeding under 42 U.S.C. 1983, and 28 U.S.C. 1343(3), seeking both injunctive and declaratory relief. The petitioners filed a cross-claim against the state respondents contending that if they were liable to the inmates, the respondents were liable to them. The matter was certified as a class action.⁵

Following a bifurcated trial in the United States District Court for the Eastern District of Virginia, a jury found against the County that conditions in the old Jail were unconstitutional, and awarded \$170,000 to a subclass of pretrial detainees, and \$40,000 to a subclass of convicts. It found in favor of the respondents in their individual capacities.⁶

The district court denied the County's cross-claim, and motion for judgment notwithstanding the verdict with respect to the respondents' liability, (Pet. App. 1a-4a), and the court of appeals affirmed.

2. The Prince William Board of County Supervisors knew the problems in the old Jail, and had initiated corrective action long before suit was filed. In 1978 it joined the City of Manassas, Virginia, in the construction of a new, five million dollar, regional jail. Ground was actually broken for the regional facility in July of 1980, nearly one month prior to the opening of the class period certified by the district court. It was occupied, and the old jail permanently shut, in April 1982 between the liability and damages trials, and some three months after the class had closed.

Moreover, the County routinely attempted to secure the assistance of state corrections officials to solve the jail's overcrowding problems. On a number of occasions, Sheriff Rollins requested that the Department of Corrections transfer prisoners out of the jail, but he met with resistance from officials who

⁵ Twenty other then-present and former inmates, both convicts and pre-trial detainees, were permitted to join as named parties.

⁶ The respondents had been dismissed from the damages action in their official capacities, on eleventh amendment grounds.

chose to elevate their concerns for possible overcrowding in the state system and other local jails, over the conditions known to exist in Prince William.

3. By late spring of 1978, and throughout the next four years preceeding the closing of the old Jail, conditions in Prince William were well known to the respondents, the Director of the Virginia Department of Corrections, T. D. Hutto, and the nine individual members of the Virginia State Board of Corrections, a citizen board serving principally as advisory to the Director.⁷

The respondents met in June 1978 to discuss the Prince William situation, following the receipt of two inspection reports dated February and June of that year which identified its seriousness. Respondents were admittedly concerned what to do with an institution identified by a state witness as "routinely the most overcrowded in Virginia," with prisoner populations eventually reaching some three hundred percent above its state-rated capacity. The situation seemed "alarming" to the then Chairman of the Board, Doris DeHart, and Board members were anxious to address the County's circumstances.

They were briefed at their meeting by an Assistant Attorney General assigned to corrections matters, who identified two principal courses of action available. First, he said, Board members could ask the Prince William circuit court to order the jail be made adequate, under § 53-129 of the Virginia Code (Pet. App. 17a). Second, they could act under § 53-134 of the Code (Pet. App. 17a-18a) and the Virginia Administrative Process Act to promulgate standards for overcrowding and then order depopulation of the County Jail to meet those standards.

⁷ Although advisory, the Board also possessed substantive authority with respect to the operation of local jails, otherwise under the plenary control of the local Sheriff, including the power to make binding rules and regulations for their operation, to limit confinement of inmates in jails that failed to conform to minimum standards, and to order surplus inmates transferred to other local institutions. This authority is addressed further in Reasons for Granting the Writ.

His preference was for the former course, however, because he believed that since the Board had no existing regulations on jail overcrowding, it had no minimum standards to enforce by such an order.⁸

The respondents also had before them at their June meeting a paper prepared by unidentified Department of Corrections' jail inspectors entitled "Options Available to the Board of Corrections." (Because of the significance that petitioners attach to this document, it is set out at its ungrammatical length in the Appendix. Pet. App. 13a-17a.) This options paper re-emphasized the seriousness of the problems presented in Prince William's jail, and itself identified various approaches to be considered.

The inspectors concurred with legal counsel that an order could be sought from the local circuit court, but contrary to that counsel contended that a "viable option . . . to immediately address the Prince William County Jail overcrowding" would be to act under the aforementioned § 53-134, to order directly that the jail be depopulated. This course would "reduce the liability potential for the facility and the Board". Pet. App. 14a.

The options paper provided yet another possible course "which the Board may have considered, if only fleetingly, due to its long range ramifications. This would be to do nothing." Pet. App. 16a-17a. The inspectors dismissed this as a viable course, however, because in their opinion "*there would be some reasonable and properly placed liability attached to this decision though, in having been aware of, yet not acted, to address the issue.*" *Id.* (Emphasis supplied.)

⁸ Under § 53-134, the Board could prohibit or limit confinement in local jails, and order transfer of inmates to other local jails, where the offending institution failed to comply with "minimum standards prescribed by the Board". Pet. App. 17a-18a.

Despite advice that direct action was not possible under the provisions of § 53-134, the respondents had in fact used the authority thereunder to close the Pittsylvania County Jail in 1977, less than one year before its initial consideration of affairs in Prince William.

Not expressly discussed at the meeting, but known to be an available option, was Mr. Hutto's statutory authority to order transfers of prisoners from one local jail to another under then existing § 53-19.17, (Pet. App. 18a), and to transfer eligible convicts from the County jail to the state penitentiary system under then existing § 53-135.1, (Pet. App. 18a). (Roughly 30% of the inmates in the County jail at any one time were "state transferrables," felons eligible under state rules to be transferred into state custody. These inmates were routinely left overlong in local jails, however, and were removed according to a six category priority system for filling vacancies in the state institutions. Overcrowding in local institutions was the lowest of these priorities.)

Mr. Hutto did not use these powers with respect to Prince William because, he said, the state system was itself at 100% capacity, the local jails were overfull, and there was "confusion" in his mind with respect to the authority granted him under state law. While the local jails were indeed overcrowded statewide, however, it was uncontested that there were, at all times, empty bed spaces available in individual institutions.

4. Despite a number of problem areas, overcrowding was concededly the respondents' principal concern with respect to the Prince William Jail. Having considered their options, therefore, the respondents chose to write the Chief Judge of the Prince William Circuit Court a "petition in letter form" asking him to take action under § 53-129 to limit the jail population to twenty five inmates. Chief Judge Arthur Sinclair answered, however, that because negotiations for a new jail were underway between Prince William and the City of Manassas, he would not act as asked. Based on that letter and on information that the County had corrected some deficiencies in the summer of 1978, the respondents determined only to "monitor" the situation in the County, and never pursued their petition with the court.

Despite clear knowledge that the foregoing petition was not, in fact, their only option, the respondents were not heard from again. The Sheriff repeatedly plead with state corrections officials to transfer his excess inmates to other jails, but nothing happened.⁹

The respondents did not even send jail inspectors to Prince William during the final four years of the old Jail's life.

REASONS FOR GRANTING THE WRIT

1. Between 1980 and 1982, the inmates in this case were forced to live in terrible and overcrowded jail conditions. Prince William County was then pressing the construction of a new jail, but until that jail was completed it was powerless to lift the increasing weight of burgeoning inmate population; the Sheriff had no choice but to accept the prisoners committed to his charge. The respondents, on the other hand, had both the legal and practical means to alleviate the inmates' suffering. Yet they did not act. Having lamely presented a "petition in letter form" to the local circuit court, they abandoned Prince William entirely as conditions deteriorated, unwilling to respond.

The petitioners contend that the respondents' inaction caused the injuries suffered by the inmates during the class period fully as much as did the County by its delay in constructing an adequate facility. The decisions of the lower

⁹ The Sheriff and the Board of Supervisors were powerless to reduce the population of the jail before the new jail was complete. The Sheriff could only attempt to persuade other local jailers voluntarily to take in some of his excess numbers, and Sheriff Rollins used this option to its fullest. However, the Department of Corrections Regional Manager for the area including Prince William acknowledged that sheriff to sheriff transfers produced very limited success. On the other hand, the respondents could order inmates transferred to available beds, under the Code sections cited in the text, and despite the fact that some of those beds were a distance from Prince William, there were routinely spaces available even in the overcrowded Northern Virginia region.

courts in this case misapplying the qualified immunity defense have permitted the respondents to escape liability for their conduct, and left Prince William to suffer the full brunt of these proceedings.

There is no doubt that the respondents were entitled to the defense of qualified immunity. But the lower courts' failure to properly understand or apply that defense in this case raises issues of public consequence.

The district court instructed the jury that the respondents would not be liable to the inmate plaintiffs, if they "believed in good faith that their actions were lawful, and that belief was a reasonable one for them to hold." Pet. App. 8a. The County objected to this instruction on the grounds that even under the law then prevailing this formulation did not sufficiently focus on the objective requirements of the good faith defense required by *Procunier v. Navarette*, 434 U.S. 555 (1978), and permitted the jury to find for them on the basis of their subjective understanding and motivations.¹⁰

The County also sought to hold the respondents directly liable to it on its cross-claim, on the basis that the record amply demonstrated that the respondents objectively knew, or should have known, that they could alleviate conditions in the County jail where the County could not, and that this objective knowledge of the rules applicable to their conduct deprived them of good faith immunity. These arguments were unavailing.

The day after post-trial motions were filed in the trial court, this Court decided *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The County believes that *Harlow* supports its understanding of the proper elements of the good faith immunity available to the respondents, and that the court of appeals erred in concluding that they were immunized by their subjective, and erroneous, understanding.

¹⁰ The court of appeals' statement that the County never directly challenged this instruction (Pet. App. 9a, n.4), is perplexing. It was formally objected to at trial, and the objection was not abandoned on appeal. Still, the court is correct that the County's principal focus has been on its assertion that the proper legal standard requires that its cross-claim be granted.

In *Harlow*, the Court “defin[ed] the limits of qualified immunity essentially in objective terms” and selected

a test that focuses on the objective legal reasonableness of an official’s acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.

457 U.S. at 815.

Harlow seems purposefully to have altered the scope of the defense available to high governmental officials, either eliminating or restricting the sufficiency of an official’s subjective understanding of his position to exceptional circumstances. Where an official reasonably and from objective indicia should have known the law applicable to his conduct, but from the purest of motives or from superable ignorance does not conform his conduct to that law to the detriment of protected rights, the defense cannot prevail. That test was not applied here.

2. In its opinion, the court of appeals apparently focused on the respondents’ asserted personal understanding of their position, seemingly accepting their claims that they had fairly relied on legal advice that they had no alternative but to approach the local circuit court, and that in any event overcrowding was so epidemic that it would not have been possible to assist Prince William. Pet. App. 8a. The court reported with apparent agreement that “communication with the state court was the only action [the respondents] could have taken to limit overcrowding in the jail”, (Pet. App. 8a), despite manifest evidence that this was but one option available. The court also appears to have accepted testimony that the Department of Corrections had transferred some persons from the jail, but could not transfer more without overburdening other local facilities and the State penitentiary. *Id.* As noted above,

however, while the assertion that local jails were overcrowded was true generally, evidence from respondents' own witnesses demonstrated that there were always empty bed spaces available, but that the respondents did not choose to make use of them.

The evidence was, more properly, that the respondents simply did not pursue any other available course, either in June 1978, or afterwards.

The court gave no analysis to whether there was in fact objective, legal, reasonableness for the respondents' position. It simply accepted their assertions that their hands were tied. To do so it necessarily had to ignore evidence that the respondents had options available to alleviate the inmates' condition, but failed to employ them: at all times between 1980 and 1982, the respondents could have transferred Prince William inmates to other institutions where space was available, under authority possessed by either the Board or the Director. They simply deemed it either practically or politically infeasible to do so. Even assuming their counsel had been correct in 1978 that the respondents could not directly order depopulation of the County jail without first adopting minimum standards with respect to overcrowding,¹¹ no reason was ever given why such proceedings were not, or could not have been, undertaken with respect to Prince William, as they had been in 1977 with respect to the Pittsylvania County jail. *See* note 8, *supra*.

The respondents knew, or should have known, too, that

¹¹ The County contended below that the notion that the respondents could enforce minimum conditions for such matters as recreation, but that they did not have authority to regulate actual or potentially unconstitutional conditions with or without a regulatory framework, was simply ludicrous. It would permit the Board to escape liability for unconstitutional conditions over which it had direct or indirect control, by the simple expedient of refusing to adopt standards with respect to such conditions. The Court does not have to address or accept this argument, however, to conclude that the respondents could have acted to depopulate the County jail, for even under their understanding of counsel's 1978 advice, they could have taken his slower boat. They simply did not.

overcrowding could render an institution constitutionally deficient, and indeed sought counsel *not* to review the state of constitutional law with respect to jail conditions, but rather to discuss options for alleviating those conditions.¹²

The court of appeals neither considered these facts, nor proceeded to any particular dissection of them. It simply rejected the County's contentions that the respondents were without objective defenses, stating in conclusory fashion that "the measure of good faith [remains] a combination of both objective and subjective elements", (Pet. App. 10a), virtually without suggestion that *Harlow* was in any sense a departure from previous decisions. The opinion suggests that it was nothing more than the court's sense of the respondents' honest, but subjective, belief that they were acting properly that underlay its conclusion they were acting in proper good faith.

It must be re-emphasized that the Sheriff was powerless to help himself, or the inmates in his jail. Without the respondents' participation, nothing could be done to effect even a temporary solution to overcrowding. To conclude to the contrary is to conclude that the respondents simply had no duty to act where they alone could, and that the full legal obligation to the inmates rests solely on Prince William County.

3. The petitioners believe that this Court has established a new legal test for the application of the good faith defense, and at least one member of the Court appears to have understood *Harlow* as have we. In his concurrence to *Illinois v. Gates*, ____ U.S. ____, 76 L.Ed.2d 527, at 567 (1983), Justice White said plainly that in *Harlow* the Court "modified the qualified immunity public officials enjoy in suits seeking damages against

¹² No state witness ever claimed to be unaware that overcrowding in a County jail could amount to constitutional wrong, or that the law was unsettled in the matter. Indeed, several months after the respondents' initial consideration of matters in Prince William, the Fourth Circuit decided the case of *Johnson v. Levine*, 588 F.2d 1378, (1978) which stated plainly that "[o]vercrowding, with all of its consequences can reach such proportions that the impact of the aggregate effect amounts to cruel and unusual punishment." *Johnson*, together with other decisions long known, provided ample notice that conditions in the Prince William Jail could violate the constitution.

federal officials for alleged deprivations of constitutional rights, *eliminating the subjective component of the standard.*" (Emphasis supplied).

Other Justices appear to see in *Harlow* a new test for individual liability under 42 U.S.C. 1983. See *Mississippi University for Women v. Hogan*, 458 U.S. 718, 745, n. 18 (1983) (Justice Powell dissenting with Justice Rehnquist concurring in the dissent.) While the County recognizes the hazard in drawing too much from dictum, these comments, following so closely in the wake of *Harlow*, suggest that the Court intended a broader purpose to *Harlow* than the court of appeals accorded it.¹³

4. The proper application of the good faith immunity defense is of major consequence in thousands of lawsuits throughout the United States. Scores of public officials are routinely sued under 42 U.S.C. 1983, and for every such official sued in his or her individual capacity, the good faith immunity is perhaps the principal defense against personal liability. It is thus a matter of signal concern to both plaintiffs and defendants

¹³ Other courts have apparently accepted that *Harlow* changed the rules. See *Saldana v. Garza*, 684 F.2d 1159, 1163, n.15 (5th Cir. 1982) ("The Supreme Court's recent opinion [in *Harlow*] has wrought a quiet revolution in the law of official immunities.") See also *Ellsberg v. Mitchell*, 709 F.2d 57 (D.C. Cir. 1983) ("Whether a defendant is entitled to 'qualified immunity' is now to be determined solely on the basis of an objective test To a much greater extent than [before *Harlow*] determination of a defendant's immunity will turn upon questions of law"); *Trejo v. Perez*, 693 F.2d 482, 484-5 (5th Cir. 1982); *Barnett v. Housing Authority of Atlanta*, 707 F.2d 1571, 1581-83 (11th Cir. 1983); *Gray v. Bell*, 712 F.2d 490, 496 (D.C. Cir. 1983); and *Haygood v. Younger*, 718 F.2d 1472, 1483-4 (9th Cir. 1983).

Intriguingly, the fourth circuit seems to have more than one view of the matter. Fifteen days before its decision in this case, it decided *Bever, et al. v. Gilbertson, et al.*, Nos. 83-1790, and 83-1971 (January 11, 1984), a case involving allegations that various state officials had terminated a number of employees of the West Virginia Department of Highways solely on the basis of their political affiliations. In that opinion the court said of *Harlow* that "[i]t eliminated the subjective aspect of the qualified immunity doctrine as theretofore understood so that more claims of qualified immunity could be resolved on motions for summary judgment." Slip op. at 6.

what the true contours of the defense may be. For defendants, of course, the question is whether they may be held personally accountable for their actions and omissions even when otherwise protected in their official capacities. For plaintiffs, and in this matter Prince William County must be so viewed, the question is whether and under what circumstances, the good faith immunity may be breached. If an official's pure heart, and his sometime reliance upon counsel in the face of objective, determinable, indications contrary, are a defense to charges that he has deprived someone of a protected right, litigants nationwide should be provided with that guidance.

The petitioners believe that this Court's "adjustment" of the qualified immunity defense in *Harlow* was sufficiently clear to have required a different result below, and that it marks, indeed, the "quiet revolution in the law of official immunities" seen by the court in *Saldana, supra*, p. 12, n. 13. Given that *Harlow* arose in the particular circumstances of a motion for summary judgment, however, the Court's message may not have been stated with sufficient force to have conveyed that message to the lower courts. It certainly did not do so here. Thus, review of this case could affirm that in the ordinary case it is plainly objective knowledge of the rules alone which is to be the proper standard by which such conduct is measured, not one's purity of purpose, and that *Harlow* does more than establish a method of disposing of motions for summary judgment.

The court of appeals was apparently concerned that by holding the respondents jointly liable with the County on its cross-claim, it would unreasonably subject the citizen members of the Board of Corrections and Mr. Hutto to personal liability for difficult, honest decisions made without malice, and perhaps deter qualified citizens from willing service. While this is not an illusory concern, it does not square with *Harlow*, and it ignores in this case that the respondents' actions and omissions were directly linked to the incarceration of inmates held in appalling

conditions which only they could reasonably alleviate. Holding the respondents liable would simply refuse them escape from the reasonable consequences of their conduct.

The petitioners believe that the lower courts have erred in this case, and that the issue presented by this proceeding is worthy of consideration by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

JOHN HOLLAND FOOTE

County Attorney for

Prince William County, Virginia

Counsel for Petitioners

Prince William County and

Sheriff C. A. Rollins, Jr.

April 1984

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IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action 81-1049-AM

CRAYTON E. McELVEEN, JR. *et al.*,
Plaintiffs,

v.

COUNTY OF PRINCE WILLIAM, *et al.*,
Defendants

ORDER

This matter comes before the court on the cross-claim of defendants County of Prince William, members of the Board of Supervisors of the County of Prince William, and the Sheriff of the County of Prince William against defendants T.D. Hutto, Director of the Virginia State Department of Corrections, and members of the Virginia State Board of Corrections. For reasons stated in the accompanying memorandum, the court **ORDERS** judgment entered in favor of T.D. Hutto and the members of the Virginia State Board of Corrections insofar as the cross-claim requests that Hutto and members of the Board of Corrections be held liable for any monetary judgment rendered against the County, the members of the County Board, and the Sheriff of the County. Insofar as the cross-claim prays for equitable relief, the court takes the cross-claim under advisement.

Let the Clerk send a copy of this order and the accompanying memorandum to all counsel of record.

/s/ RICHARD L. WILLIAMS

Richard L. Williams
United States District Judge

DATE: June 23, 1982

[Text of memorandum accompanying the preceding order denying County cross-claim]:

MEMORANDUM

This matter comes before the court on the cross-claim of defendants County of Prince William, members of the Board of Supervisors of the County of Prince William, and the Sheriff of the County of Prince William ("the County defendants") against defendants T. D. Hutto, Director of the Virginia State Department of Corrections, and members of the Virginia State Board of Corrections ("the State defendants"). For reasons stated below, the court orders judgment entered in favor of the State defendants, insofar as the cross-claim requests that the State defendants be held liable for any monetary judgment rendered against the County defendants.

During the trial before the jury, the court dismissed the State defendants in their official capacities from the case, on eleventh amendment grounds. The State defendants remained in the case in their individual capacities. The jury returned a verdict against the County defendants and in favor of the State defendants. The court subsequently denied County defendants' and plaintiffs' motions for judgment notwithstanding the verdict as to the State defendants under Fed. R. Civ. P. 50(b)(1).

The immunity afforded by the eleventh amendment to the State defendants in their official capacities does not apply to them in their individual capacities. The jury could have returned a verdict against the State defendants in their individual capacities but did not do so. Granting relief to the County defendants via their cross-claim would have the same effect as granting relief to them via their motion for judgment notwithstanding the verdict. The issues presented to the jury regarding allocation of liability as between the County and State defendants are no different than the ones now presented to the court by the vehicle of the County defendants' cross-claim. The court can see no more reason to nullify the verdict of the jury via the

cross-claim than via the motion for judgment *n.o.v.* Hence the court will order judgment entered in favor of the State defendants as to the cross-claim, and leave the jury verdict undisturbed.

An appropriate order accompanies this memorandum.

/s/ RICHARD L. WILLIAMS

Richard L. Williams
United States District Judge

DATE: June 23, 1982

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Number 82-6679

Crayton E. McElveen, Jr.; Geary Lee
Jamison; on behalf of themselves and
all other inmates of Prince William
County Jail, present and future,

and

Julia Phillips; Larry Eugene Collins;
Richard Murray; Jerry Michael Collins;
Jeffrey Proctor; Charles Cuniff;
Kelly Roach; Milton Jackson; Westley
S. Blackburn; Bernard R. Richardson;
William Edward Parker; James Edward
Parker; James Dodson; Charles Scarpone;
Buddie Spicer; Matthew L. Wright;
Larry E. Shane; Joseph Deans, Jr.;
Eric Lee Backherms; Timothy Wayne
Orehowsky,

Appellees

v.

County of Prince William; Eileen
Stout, Sup. Dumfries District; Donald
Kidwell, Sup. Woodbridge District
James J. McCoart, Sup. Neabsco
District; G. Richard Pfitzner, Sup.
Coles District; Joseph D. Reading,
Sup. Brentsville District; Kathleen
K. Seefeldt, Sup. Occoquan District;
Donald L. White, Sup. Gainesville
District; C. A. Rollins, Jr., Sheriff,
Prince William County,

Appellants

and

Terrell Don Hutto, Director, Virginia Department of Corrections; Sidney Parker, Chairman, Virginia Board of Corrections; Joseph B. Benedetti, Member, Virginia Board of Corrections; Donald W. Huffman, Member, Virginia Board of Corrections; JoAnn Diegennaro, Member, Virginia Board of Corrections; Norvell K. Robinson, Member Virginia Board of Corrections; William P. Kanto, Member, Virginia Board of Corrections; Stephen D. Rosenthal, Member, Virginia Board of Corrections; Arnold J. Smith, Jr., Member, Virginia Board of Corrections; John W. Williams, III, individually and in their official capacities,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge. (C/A 81-1049-A)

Argued: November 3, 1983 Decided: January 26, 1984

Before WIDNER, HALL and MURNAGHAN, Circuit Judges.

John H. Foote, County Attorney (James E. Barnett, Assistant County Attorney; James A. Welch on brief) for Appellant; Alan Katz, Assistant Attorney General (Gerald L. Baliles, Attorney General of Virginia, Eric K. G. Fiske, Assistant Attorney General on brief) and Marilyn G. Rose (Ervan E. Kuhnke, Jr.; Victor M. Glasberg on brief) for Appellees.

HALL, Circuit Judge:

Prince William County, the Sheriff of Prince William County, and the Prince William County Board of Supervisors (collectively referred to as the "County") appeal from orders denying the County's motions for a directed verdict and judgment notwithstanding the verdict on its cross-claim against the Chairman and the Director of the Virginia Board of Corrections, and members of the State Board of Corrections (collectively referred to as the "State") in an action filed by inmates of the Prince William County Jail pursuant to 42 U.S.C. § 1983. The County also appeals from a judgment entered on a jury award of compensatory damages in favor of the inmates. Finding no error, we affirm.

I.

This action was filed in November, 1981 by an inmate and an ex-inmate of the Prince William County Jail (the "Jail").¹ Plaintiffs alleged that during their incarceration they were subjected to overcrowding and other conditions which amounted to cruel and unusual punishment. They requested declaratory and injunctive relief and damages. Named defendants included the County and the State. All defendants except Prince William County were sued in both their individual and official capacities.²

The County filed a cross-claim against the State, alleging that the State had an obligation to depopulate the Jail by transferring inmates to other local jails, or into the state penal system. The County also asserted that the State's failure to depopulate the Jail rendered the State jointly liable with the County for any verdict based upon overcrowding. The State claimed "good faith" or qualified immunity from such liability.

¹ Subsequently, the court granted class certification to all persons incarcerated in the Jail from August 1, 1980, through January 22, 1982.

² Before trial, the Sheriff of Prince William County was dismissed as a defendant in his individual capacity.

A bifurcated jury trial was conducted on the issues of liability and damages. During the liability portion of the trial, plaintiffs presented evidence that they had been subjected to unconstitutional overcrowding, poor sanitation, understaffing, and lack of access to a law library. The County admitted that jail conditions were poor, but denied liability, and presented evidence that the State was aware of the overcrowded conditions. The State conceded that the Jail was overcrowded but nevertheless denied liability. The State presented evidence that the Board of Corrections had discussed the situation with its counsel and, upon his advice, requested the County Circuit Court to order the County to either depopulate the Jail or erect a new jail. Shortly thereafter, the Board was advised by the Chief Judge of the County Circuit Court that the planning process was underway for a new jail. The State emphasized that the Board's communication with the state court was the only action it could have taken to limit overcrowding in the Jail. The State also presented evidence that the Department of Corrections transferred some inmates out of the Jail and could not have transferred any more without overburdening other local facilities or the State penitentiary. At the close of the State's evidence the County moved for a directed verdict on its cross-claim. The district judge deferred ruling on this motion and, instead, took the cross-claim under advisement.

The district judge instructed the jury that the State defendants would not be liable for damages for jail conditions found unconstitutional if the State defendants "believed in good faith that their actions were lawful, and that belief was a reasonable one for them to hold." The jury returned a verdict in favor of the plaintiffs, against the County, and in favor of the State defendants in their individual capacities.³ Subsequently, the County moved for judgment notwithstanding the verdict and "renewed" its motion for a directed verdict on its cross-claim against the State. These motions were made on the ground that

³ The court had previously directed verdicts in favor of individual members of the Prince William County Board of Supervisors and the State defendants in their official capacities.

the jury was given the wrong standard with which to evaluate the State's defense of good-faith immunity. Both motions were denied.

During the damages portion of the trial, the jury awarded the inmates a total of \$210,000 in compensatory damages against the County. The court entered judgment on that verdict and the County moved for an amended judgment or, in the alternative, for judgment notwithstanding the verdict. This motion was denied. The County appeals from the judgment below and from the orders denying its cross-claim against the State.

II.

On appeal, the County contends that the district court erred in denying the County's cross-claim against the State because the court did not evaluate the State's good-faith defense by a strictly objective standard. In addition, the County argues that there was insufficient evidence to support the jury award. We disagree with both of these contentions.

The good-faith standard employed by the district judge in instructing the jury included both the subjective element of good faith "belief," and the objective element of "reasonableness" for that belief.⁴ The County argues, however, that applicable law requires the use of a purely objective standard. We find this position untenable.

The standard employed by the district judge originated in *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In *Scheuer*, the Supreme Court outlined the scope of qualified immunity.

[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the . . . circumstances as they reasonably appeared at the time of

⁴ The County does not directly challenge the jury instruction itself or the jury verdict as to liability. Instead, the County refers to the jury instruction as an example of the standard the trial judge himself presumably applied in ruling on the motions for directed verdict and judgment notwithstanding the verdict on the cross-claim.

the action on which liability is sought to be based. *It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity* of executive officers for acts performed in the course of official conduct.

Id. at 247-48 (emphasis added). The year after *Scheuer* was decided, the Supreme Court addressed the good-faith standard again in *Wood v. Strickland*, 420 U.S. 308 (1975). The *Wood* Court observed that the appropriate standard necessarily contained elements of both objective and subjective good faith: “[t]he official himself must be acting sincerely and with a belief that he is doing right, but an act violating [an individual’s] constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law . . . than by the presence of actual malice.” 420 U.S. at 321. The Court cited *Scheuer* with approval, and made no effort to criticize or distinguish the good-faith test as enunciated in that case.

In 1978, the Supreme Court again considered the good-faith standard in *Procunier v. Navarette*, 434 U.S. 555 (1978). The *Navarette* Court quoted extensively from *Scheuer* and *Wood*, and reaffirmed the good-faith standard as expressed in those cases. Thus, we find that in *Scheuer*, *Wood*, and *Navarette*, the Supreme Court consistently deemed the measure of good faith to be a combination of both objective and subjective elements. Other circuits that have considered the elements of the good-faith defense have found similarly. *See, e.g., Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981); *Reimer v. Short*, 578 F.2d 621 (5th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979); *Laverne v. Corning*, 522 F.2d 1144 (2nd Cir. 1975).

The County, however, argues that in *Harlow v. Fitzgerald*, ____ U.S. ____, 102 S.Ct. 2727 (1982), the Supreme Court abolished the subjective element of the good-faith defense. We disagree. In *Harlow*, the Supreme Court clearly recognized that:

[T]he “good faith” defense has both an “objective” and “subjective” aspect. The objective element involves a presumptive knowledge of and respect for “basic unquestioned constitutional rights.” The subjective component refers to “permissible intentions” Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official “*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or if* he took the action *with malicious intention* to cause a deprivation of constitutional rights or other injury”

____ U.S. ____, 102 S.Ct at 2737 (citing *Wood v. Strickland*, 420 U.S. at 308, 320-22).

The *Harlow* Court went on to observe that “[t]he subjective element of the good faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial.” *Id.* The Court, therefore, held that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” ____ U.S. at ____ 102 S.Ct. at 2738. This holding was intended to facilitate the resolution of insubstantial claims against government officials by summary judgment. Although the *Harlow* Court indicated that the good-faith defense turns *primarily* on objective factors, ____ U.S. at ____, 102 S.Ct. at 2739, it did not hold that an *exclusively* objective standard was to be applied to claims that proceeded to trial.

Thus, the County's argument that the standard for good-faith immunity must be purely objective, is untenable, and its claim that the trial court erred by not directing a verdict or granting judgment notwithstanding the verdict, must fail.⁵

The County also contends that the jury award of compensatory damages was not supported by substantial evidence.⁶ This argument is clearly meritless. The County concedes in its brief that the Prince William County Jail had become a "terrible facility" which "exceeded permissible constitutional limitations." Numerous actual and compensable injuries were presented by plaintiffs at trial. Fact-finding by a jury will be set aside only where the evidence, viewed in the light most favorable to the parties supporting the jury's verdict, is so clear that reasonable persons could reach no other conclusion than that asserted on appeal. See *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350 (4th Cir. 1941). Under this standard, there is no basis for setting aside the jury's verdict in the instant case.

⁵ The County further submits that the State Board of Corrections' reliance on the advice of its counsel in formulating a response to overcrowding in the Jail cannot be used to support a good-faith defense. We disagree.

Although consultation with an attorney is not *proof* of the Board's good faith, it is certainly *indicia* of good faith, *Jihaad v. O'Brien*, 645 F.2d 556, 563 (6th Cir. 1981), and therefore should be considered in evaluating the State's defense. Furthermore, the fact that the State defendants found it necessary to consult counsel and then follow his advice tends to vitiate the County's argument that these defendants knew or should have known that their course of action violated the constitutional rights of the members of the inmate class.

⁶ In its brief, the County also argued that compensatory damages could not be awarded in this case as a matter of law. At oral argument, however, the County abandoned this contention in light of *Doe v. District of Columbia*, 697 F.2d 1115 (D.C. Cir. 1983), and, instead, argued only that there was insubstantial evidence to support the award of compensatory damages.

IV

For the foregoing reasons, the judgment of the district court is affirmed.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

January 26, 1984

TO: James A. Welch, Esq. Victor M. Glasberg, Esq.
 John H. Foote, Esq. Alan Katz, Esq.
 Marilyn G. Rose, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 82-6679 this date.
The Court's opinion is enclosed.

* * *

WILLIAM K. SLATE, II
Clerk

**OPTIONS AVAILABLE TO THE BOARD
OF CORRECTIONS**

It is the collective opinion of the Inspectors that Prince William County Jail, given its present state of flux and administrative dynamics, has a limited number of viable options available.

At best even with a drastic reduction of the facility's present capacity, there would still remain many serious deficiencies. These deficiencies include inadequate operations and administrative space. This represents a compounding variable in the quality and quantity of services this facility is able to afford either inmate population or enforcement continuity. A greater threat potential exists in the areas of health and safety realms and it is the weighted consideration given to this liability factor that constrained any expanded range of options and alternatives.

—OPTIONS—

#1. Reduce Population—By Order of the Board of Corrections

A viable option exists for the Board, under Chapter 6, Code of Virginia, Article I, Section 53-134, to immediately address the Prince William County Jail overcrowding. This would serve to firmly establish the Board's concern and interest in guaranteeing adequate and meaningful service but it would immediately reduce the liability potential for the facility and the Board by its initiating action (prohibit confinement, require transfer of prisoners in substandard institutions). An additional benefit will result in placing the cost of municipal prisoners relocation, and housing costs, to be borne by the recalcitrant County official and place the onerous on the facility and the judiciary in refusal or enjoinder of the order so issued.

It would necessitate an order from the Board, based on its responsibility under Section 53-133 [sic], with copies to the Sheriff, governing body of the County affected and the Judiciary. If adopted, we recommend that the population limit be set at 25 inmates.

#2. Reduce Population—By Order of Court

The Board may, under direction of Chapter 6, Article I, 53-129, appeal to the Court, to order, on behalf of the Commonwealth, against the governing body, to show cause why a preptory mandamus should not be issued commanding them to erect a jail. It should also direct a reduction of population, not contingent on new constructions, due to the facilities present condition. The population should be limited to 25.

There has, in the State, been some precedence established for this process in the Roanoke area. A resolve, by this option could prove time consuming to the detriment of the Board but especially to the inmates regarding Health and Safety issues.

#3. Reduce Population—Accountability Placed on Jail Official

The Board may, under Chapter 6, Article I, Section 53-173, opt to place the accountability on the responsible operator for his neglect, nonfeasance, or default. This would consider both historical and current documentation. A complaint would be filed, by the Board, with the Circuit Court of the County and a hearing on the complaint will be set. If the Court finds that the complaint is justified, the Court will enter an order directing the Compensation Board to withhold approval of payment of any further salary to such Sheriff until compliance is achieved with the State Board of Corrections requirements.

Both the administration and operations of the jail, for whatever reasons, are counterproductive. They are detrimental to both the goal and the mission of Corrections. Attitudes of the staff and inmate population are increasingly negative and border on being volatile. This factor will increase in the coming months as ambient temperatures increase with approaching summer heat.

These cumulative effects in turn increase the divisiveness within the facility. Factionalism dilutes the effectiveness of policy or directives even in the best run facility.

Priorities, though set by policy and mandated by State law, are routinely subverted and the security of the jail suffers as a result. Correctional Officers are frequently impressed to transport prisoners which reduces the overall supervision of inmates. This is particularly hazardous, especially in view of the overcrowded conditions. The absence of any diversionary programs compounds this further and dissatisfaction increases overall.

Health care delivery services are inadequate and have been so noted for some time. In view of the expenditures, from July 1977 through April 1978, of \$21,280.00 plus medication expenses of \$670.00 for the same period, cost effectiveness is not a priority.

Officers are placed in jeopardy daily to service the detention area without backup personnel. Even the most prudent and reasonable security measures are forsaken in the name of expediency.

Transportation needs increase proportionately with an increased population and forces inmate juggling to maintain a fixed number. Officers are also required to handle an enormous number of process and warrant services which seriously reduces available manpower for jail services

Reduction of the population will of course reduce the numerical odds for confrontation. It will also reduce the liability potential regarding health and safety realms. It does not, and will not, increase the quality or quantity of services afforded the inmates. This can only be accomplished by a reordering of priorities; and adherence to established practices; and a restructuring and attention to positive organizational and heirarchical dynamics within the facility.

There is an additional option, which the Board may have considered, if only fleetingly, due to its long range ramifications. This would be to do nothing. This would be, in some cases, an available but not viable option. There would be some

reasonable and properly placed liability attached to this decision though, in having been aware of, yet not acted, to address the issue. This would be especially true of the health and safety items regarding Prince William County Jail and the increasing litigations nationwide.

Any individual or collective diversionary programs which can be implemented will reduce the population and should be encouraged regardless of the Boards legal course of action.

For example: work release, a "Released on their own recognizance-ROR, increased use of Bail and Bond programs, Study release. All these are effective population reduction alternatives.

[End]

§ 53-129, Code of Virginia (1950), as amended:

Courts to order jails erected and repaired.

When it shall appear to the circuit court of any county or city that there is no jail therein, or that the jail of such county or city is insecure, out of repair or otherwise inadequate, it shall be the duty of such court to award a rule in the name of the Commonwealth against the governing body of the county or city to show cause why a writ of mandamus should not issue commanding the governing body to erect a jail for the county or city, or to cause the existing jail of such county or city to be made secure, put in good repair, or rendered otherwise adequate, as the case may be.

§ 53-134, Code of Virginia (1950), as amended:

Board may prohibit confinement and require transfer of prisoners in substandard facilities.

The Board is authorized to limit, by its order, the confinement of prisoners in any local correctional facility or lock-up, which is not constructed, equipped, maintained and operated so as to comply with minimum standards prescribed by the

Board, either by prohibiting confinement of any prisoners in such local correctional facility of lock-up, or by limiting the maximum number of prisoners to be confined therein, as the Board deems appropriate. The Board may designate some other local correctional facility or lock-up in or at which shall be confined persons who otherwise would have been confined in the facility subject to the Board's order. Copies of each order shall, upon being issued, be sent to the officer in charge of the facilities affected, to the governing bodies of the counties, cities and towns affected and to the judge of the circuit court of each county and city in which are located the local correctional facilities or lock-ups affected.

§ 53-19.17, Code of Virginia (1950), as amended:

Transfer of prisoners.

The Director is authorized to transfer, or to require to be transferred any person accused or convicted of an offense against the laws of the Commonwealth of Virginia or of any other state or country or any offense in violation of any city, town or county ordinance within the Commonwealth, or any witness held in any case to which the Commonwealth is a party, if confined in any penal institution within the Commonwealth from any penal institution in which such person is confined to such other penal institution in the State as is designated by the Director.

§ 53-135.1, Code of Virginia (1950), as amended:

Director may transfer jail inmates.

The Director shall have the power to transfer any jail inmate, except inmates convicted under § 20-61 [involving domestic support], whose sentence is final from a jail to any State or city farm, State training school or correctional field unit; provided that any jail inmate whose sentences are final and excluding fines or cost total more than twelve months shall in all instances be so transferred; provided further that nothing in this section shall interfere with the control and maintenance of the State correctional institutions and training schools, as provided by law.



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No. ~~83-1723~~

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FILED

JUN 15 1984

ALEXANDER L. STEVAS.
CLERK

**In The
Supreme Court of the United States**

October Term 1984

PRINCE WILLIAM COUNTY, VIRGINIA, *et al.*,
Petitioners,

v.

TERRELL DON HUTTO, *et al.*,
Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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31 pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit correctly held, consistent with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) that the good faith defense turns primarily, but not exclusively, on objective factors.



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In The
Supreme Court of the United States
October Term 1984

No. 83-1783

PRINCE WILLIAM COUNTY, VIRGINIA, *et al.*,
Petitioners,

v.

TERRELL DON HUTTO, *et al.*,
Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

OPINIONS BELOW

The memorandum opinion of the district court denying the County's cross-claim against the State Defendants is unreported and is included herein as Appendix A. The opinion of the court of appeals is reported at 725 F.2d 954 (4th Cir. 1984).

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This action was originally filed in November, 1981, by an inmate and former inmate of the Prince William County, Virginia Jail (the "Jail"). Subsequently, the district court granted class certification to all persons incarcerated in the Jail from August 1, 1980, through January 22, 1982. The plaintiffs alleged that during their incarceration they were subjected to overcrowding and other conditions which amounted to cruel and unusual punishment. They requested declaratory and injunctive relief and damages. The named defendants included Prince William County, the Sheriff of Prince William County, the Prince William County Board of Supervisors (collectively referred to as the "County"), and the chairman and the members of the Virginia Board of Corrections (hereinafter the "Board") and the director of the Department of Corrections (collectively referred to as the "State defendants"). All the defendants, with the exception of Prince William County, were sued in their individual and official capacities.

During the course of the litigation, the County filed a cross-claim against the Commonwealth alleging, essentially, that the Commonwealth had an obligation to depopulate the Jail by transferring the inmates to other local jails or into the state penal system. The County also alleged that the Commonwealth's failure to depopulate the jail rendered the Commonwealth jointly liable with the county for any verdict based on overcrowding. The State pled a good faith defense to such liability.

A bifurcated jury trial was conducted on the issues of liability and damages. During the liability portion of the trial, plaintiffs presented evidence that they had been subjected to unconstitutional overcrowding, poor sanitation, understaffing, and lack of access to the law library. The

County admitted the jail conditions were poor, but denied liability, and presented evidence that the Commonwealth was aware of the overcrowded conditions and did nothing to alleviate them.

The State introduced evidence that in February of 1978, the Virginia Board of Corrections became aware of an adverse jail inspection report of the Prince William County Jail. In response to that report, the Board sent one of its members to meet the chief judge of the Circuit Court of Prince William County. As a result of that meeting, there was a request by the Board in May of 1978 to the Department of Corrections to arrange for a special follow-up inspection to see if conditions in the Jail had been improved. The results of that inspection were reported to the Board at its June, 1978, meeting. At the June meeting, the Board discussed with its counsel, an Assistant Attorney General, its options to correct deficiencies noted in the second inspection report.¹ Counsel advised the Board that one option open to them was to take action pursuant to the Code of Virginia² which permitted the Board to bring noted deficiencies to the chief circuit court judge's attention who had authority to order corrections upon evidence of adverse conditions. Counsel also advised the Board that another option available to them was the taking of direct administrative action in accordance with the State's Administrative Process Act, but

¹ Petitioner has included in an appendix to his petition a paper prepared by some unidentified jail inspector which purports to set forth options available to the Board of Corrections to deal with the Prince William Jail. Incredibly, petitioner seems to contend that the State defendants should have ignored the advice of their attorney concerning their duties under the Code of Virginia and followed a course advocated by a layman.

² The sections of the Code of Virginia relevant to the facts of this case are: § 53-135 (now § 53.1-70), 53-134 (now § 53.1-69), § 53-19.17 (now incorporated into 53.1-21) 53-129 (now 53.1-71) and § 19.2-310, all of which may be found at Appendix B.

in his opinion this was not a viable option because the Board's authority was limited to enforcing its own standards. At the time in question, the Board had not enacted standards specifically addressing overcrowding, and this was the thrust of the problem at the Prince William County Jail.

At the Board's direction, therefore, counsel drafted a petition in letter form addressed to the chief judge, enclosing the inspection reports and requesting that the court consider taking action against the County in the form of an order to show cause to either erect a new jail to improve the conditions in the old jail, *inter alia*, by a population reduction. Shortly after communication with the court, the Chairman of the Board of Corrections received a reply from the chief judge which advised that the planning process was underway for a new jail, and that the court would thus hold in abeyance issuance of further orders depending upon the county's action. As a result, the Board Chairman, by further correspondence, requested that the court keep the Board informed of developments.

Later in the summer of 1978, the Board received additional information from the then acting county administrator of Prince William County. These reports detailed improvements that had been made in the Jail to include correction of fire safety deficiencies. Although the matter continued to be discussed by the Board periodically, the County did not make the Board aware of any alleged "unconstitutional" conditions in the Jail that would have necessitated further action.

Counsel testified at the trial of this matter in response to a question on cross-examination, that he advised the Board that the only viable action they had available to limit the population in the Prince William County Jail was to report known deficiencies to chief judge of the circuit court.

On redirect examination, counsel explained that any ordered population cap by the Board through its own administrative means would ultimately be enforced through the circuit court. In light of the fact that the Board had already approached the circuit court and requested a reduction of population, and was told, in effect, that that request was to be taken under advisement by the Court, further efforts by the Board to limit population would have been fruitless, and he so advised the Board.

Terrell D. Hutto, the Director of the Department of Corrections, testified that in response to overcrowding generally in both state and local prisons, the Department of Corrections devised a priority system to facilitate the flow of inmates from local jails into the Department of Corrections. Mr. Hutto also testified that there was a lack of beds available for long-term maximum security inmates which exacerbated overcrowding state wide.

Mr. Hutto noted during his testimony that the authority of the Director of the Department of Corrections to transfer inmates from one penal institution to another was unclear, and that he had been so advised by his attorney periodically when attempts were made to deal with the overcrowding problem. Testimony was also adduced that Mr. Hutto had met with the Sheriff of Prince William County and the Virginia Secretary of Public Safety to discuss their mutual concerns about overcrowding in Northern Virginia. On the date of that meeting, however, there were no inmates in Prince William who were eligible for transfer into the state system, consequently, no relief could be provided to the Sheriff. Mr. Hutto also indicated that in an effort to deal with overcrowding, all security beds, even hospital beds, were filled so that the most could be made of available resources.

At the close of the State's evidence, the County moved for

a directed verdict on its cross-claim. The district judge deferred ruling on this motion and, instead, took the cross-claim under advisement. The judge instructed the jury that the State defendants would not be liable for damages for jail conditions found unconstitutional if they "believed in good faith that their actions were lawful, and that belief was a reasonable one for them to hold." The jury returned a verdict in favor of the plaintiffs, against the County, and in favor of the State defendants. Subsequently, the County moved for judgment notwithstanding the verdict and renewed its motion for a directed verdict on the cross-claim against the State. These motions were denied.

REASONS FOR DENYING THE WRIT

I. The Assumption by the Petitioner, County of Prince William, that Subjective Factors are no Longer to be Considered in the Determination of Good Faith Fundamentally Misconstrues this Court's Holding in *Harlow V. Fitzgerald*.

A. Harlow's Application Is Limited to the Summary Judgment Stage of the Proceedings

It is the petitioner's contention that after this Court's decision in *Harlow*, the subjective prong of the good faith test has been completely eliminated from any consideration of good faith, and only an objective standard is still viable.³

³ The petitioner's reliance on the dicta contained in Justice White's concurring opinion in *Illinois v. Gates*, 103 S.Ct. 2317 (1983), that *Harlow* eliminates the subjective component of the good faith standard is misplaced. The context of the remark is Justice White's response to a contention that a good faith exception to the exclusionary rule would require an inquiry into the subjective belief of law enforcement officers. Justice White's opinion does not mean that subjective factors, viewed objectively, should not be considered at trial. A contrary interpretation would be inconsistent with Justice White's concurrence in *Harlow*. The majority in *Harlow* recognized that the objective test has room in it for subjective elements.

This view, however, ignores the salient factual circumstances that were before the Court in that case and which shaped its decision. *Harlow*, as it applies to the good faith defense, in the final analysis, deals with nothing more than the circumstances and standards under which summary judgment is appropriate when good faith has been raised as a defense. Its rationale should not be extended beyond the pleading stage and must be read in conjunction with the principals of law applicable to summary judgment.

Any discussion of the parameters of the good faith defense as described in *Harlow* must begin with an examination of *Wood v. Strickland*, 420 U.S. 308 (1974), from which *Harlow* directly descends. In *Wood, id.*, the district court had instructed the jury that a decision in favor of the respondents must be premised upon a finding that the petitioner, a school official, acted with malice. The court of appeals, however, found that the specific intent to wrongfully harm the petitioners was not a requirement for the recovery of damages. Instead, petitioners needed only to establish that the respondents did not, in light of all the circumstances, act in good faith. In its decision, this Court noted that the appropriate standard of good faith necessarily contains elements of both objective and subjective good faith. The Court reasoned specifically:

"The official himself must be acting sincerely and with the belief that he is doing right, but an act violating his students' constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice." 420 U.S. at 321.

The Court noted further that to be entitled to the good faith defense an individual claiming it must be held to a standard

of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. The Court set forth the standard for the good faith defense in holding thus:

"Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the students affected, or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury to the student."⁴

Harlow states that prior decisions of this Court have established that the good faith defense has both an objective and a subjective aspect; the objective element involves a presumptive knowledge of and respect for basic unquestioned constitutional rights, and the subjective component refers to permissible intentions. Historically the Court has defined these elements by identifying the circumstances in which qualified immunity would not be available. Characteristically, in *Harlow* the Court explained, referring to both the objective and subjective elements, that qualified immunity would be defeated if an official knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of a constitutional right or other injury.

The Court clarified the reason for its shift in emphasis to

⁴ As this court recognized at note 25 of *Harlow*, although *Wood* explicitly is limited to its factual circumstances, the *Wood* formulation has been quoted as a general statement of the qualified immunity standard. See e.g. *Procunier v. Navarette*, 434 U.S. 555, 562-63, 566 (1978), quoted in *Baker v. McCollan*, 443 U.S. 137 (1979).

a more objective good faith test, by pointing out that the subjective test frequently proves incompatible to the admonition in *Butz v. Economou*, 438 U.S. 478 (1978) that unsubstantial claims should not proceed to trial. The difficulty arises, according to the majority opinion, because an official's subjective good faith has been considered a question of fact necessitating resolution by a jury and which may not be resolved on motion for summary judgment. The Court explains, consistently with the rationale of *Butz*, that bare allegations of malice should not suffice to subject government officials either to the cost of trial or to the burdens of broad-reaching discovery holding on this point that . . . "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. It was upon this basis, essentially, the *Wood* objective good-faith standard, absent the specific language of intent, that the Court upheld the dismissal by summary judgment in *Harlow*. Therefore, it is evident that the *Harlow* discussion of the emphasis on objectivity was directed at streamlining summary judgment procedure. It was intended to harmonize the good faith test with the sensible observations of *Butz* and is not the precursor of the abandonment of subjective good faith in all circumstances.

*B. In Any Event, Harlow Does Not Totally
Eliminate Subjective Factors.*

Even assuming that *Harlow's* restatement of the good faith test has some application beyond the resolution of the question of the availability of good faith at the summary judgment stage, its formulation is consistent with the in-

struction given by the trial court in the instant case that State defendants would not be liable for damages if they believed in good faith that their actions were lawful, and that belief was a reasonable belief for them to hold, because *Harlow*, does not eliminate all subjective considerations. It merely puts them in objective terms. This is made abundantly clear by the carefully chosen language of the opinion. Justice Powell, writing for the Court, took pains to specifically point out that the limits of qualified immunity are to be defined in *essentially* objective terms, and that the test is one that *focuses* on the objective legal reasonableness of an official's acts. (emphasis supplied). Justice Powell also recognized that some extraordinary circumstances may arise where a defendant can prove that he neither knew nor should have known of the relevant legal standard, and, under those circumstances, the official would be entitled to the defense on *primarily* objective factors. Therefore, given the recognition in the *Harlow* opinion that the objective standard is not exclusive, the petitioner's position is untenable.⁵

The petitioner's citation to *Saldana v. Garza*, 684 F.2d 1159 (5th Cir. 1982) in footnote 13 of the petition for certiorari, as heralding a revolution in the law of official immunity, is interesting and revealing. *Saldana* was an action brought under § 1983 against police officers for allegedly subjecting the plaintiff to arrest and detention without

⁵ The proposition that there are still valid subjective considerations in determining good faith after *Harlow* is supported by Justice Brennan's separate opinion in that case. Justice Brennan acknowledges that it may be necessary to utilize discovery to determine what a defendant knew at the time of his actions to determine if a good faith defense is available. This is essentially an inquiry into the subjective.

Trejo v. Perez, 693 F.2d 482 (5th Cir. 1982), cited with approval by the petitioner also recognizes that subjectivity in the good faith determination has not been altogether eliminated by *Harlow*.

probable cause. The defendants affirmatively claimed that they acted "in good faith, and with a reasonable belief in the lawfulness of their acts." In their answers and proposed pretrial order, they claimed that their reasonable good faith belief in the lawfulness of their conduct served as a bar to liability. 584 F.2d at 1162 n.10.

The Fifth Circuit Court of Appeals, applying *Harlow*, noted that prior to that case there were two avenues open to a plaintiff who sought to rebut the qualified immunity defense: either an allegation that the defendant official acted with subjective malice or that the defendant acted in violation of clearly established law. According to the Fifth Circuit, all *Harlow* did was to make the plaintiffs' burden easier by removing the absence of malicious intent as a possible defense. All the plaintiff must now show is the violation of a clearly established statutory or constitutional right. Nevertheless, the court of appeals found in *Saldana* that the plaintiff had failed to meet his burden and overcome the good faith defense by showing that the defendants acted in violation of clearly established law. What is even more telling is that the court did not find that the defendants claim of a good faith and reasonable belief in the lawfulness of their acts was in any way contrary to the standard enunciated in *Harlow* or confusing to the jury. The revolution claimed by the petitioner appears, on close examination, to be no more than a change in the focus from a combination of objective and subjective elements to reliance on primarily objective factors. This is consistent with the language of *Harlow* and the court of appeals decision below in this case. Rather than revolution, *Harlow* indicates evolution and minor evolution at that.

On reflection, the petitioner is asking, in essence, that this case be reversed because the State defendants were held

to a stricter standard than *Harlow* requires. Not only is the instruction in this case inclusive of and not inconsistent with *Harlow*, as the petitioner claims, but the argument is illogical, and frivolous. If the State defendants meet the burden of satisfying an instruction which encompasses both an objective and subjective standard, then it must follow, a fortiori, that they satisfy merely the former. In satisfying more than the law requires, how then can the defendants' good faith be less?

II. Even Under a Purely Objective Standard, the State Meets the Test of Good Faith

The linchpin of the petitioner's argument is his contention that the evidence demonstrated objectively that the defendants knew or should have known that they could alleviate conditions in the Jail and that this objective knowledge deprived them of good faith immunity. Assuming, arguendo, that only objective factors obtain, the criteria established by *Harlow* for good faith is whether the conduct complained of violates clearly established statutory or constitutional rights of which a reasonable person would have known. The petitioner, however, appears to ignore the fact that the "law" involved in this case was not settled at all. In fact, contrary to the view of the jury, the district court, the court of appeals and counsel for the State, the petitioner contends that there were approaches available under state law that the State did not take. What could be more objective good faith in the instant factual situation, however, than consultation with one's attorney as to the options available and then following the advice received? The fact that petitioner does not agree with the advice is irrelevant, because it cannot show that the advice was demonstrably incorrect. The jury concluded that the State acted reasonably, and its conclusion was supported by objective evidence.

The undisputed evidence in this case is that once the State defendants became aware that the Prince William County Jail was overcrowded, both the Board and the Department of Corrections consulted with their attorney and followed his advice in dealing with the problem. Furthermore, no evidence was ever introduced that any of the defendants was ever informed or became aware that the Jail was more than overcrowded. No jail inspection reports or communications from the Sheriff ever indicated to these defendants that conditions in the Jail had reached the proportion of a constitutional deprivation; therefore, from a purely objective review of the conduct of the State defendants, a jury could have and, in fact, did conclude that these defendants acted reasonably in dealing with the Prince William County Jail. Consequently, the objective good faith test has been met in this case, and the petitioner's argument for certiorari must fall of its own weight.

In light of these circumstances and the unique factual situation presented by this case, which is unlikely to re-occur, this case does not present a proper forum for review of the issues presented by the petitioner.

III. Review by This Court Involves Only Questions of the Sufficiency of the Evidence Presented to the Trial Court and Does Not Present a Substantial Federal Question

In the petition for a writ of certiorari, the County points to several areas of disagreement with the jury and the court of appeals on the significance and sufficiency of the evidence adduced at the trial and the jury's conclusions based on that evidence. As long ago as *Mobile v. Eslava*, 41 U.S. 234 (1842) this Court recognized that a factual determination by a jury is conclusive. Moreover, the Court has specifically held that where there is an evidentiary basis for its verdict, the jury is free to disregard or disbelieve whatever

facts are inconsistent with its conclusions. *Basham v. Pennsylvania Railroad Company*, 372 U.S. 669 (1963). However, the petitioner would have the Court disregard its long established precedent and substitute its judgment for that of the jury and the court of appeals in the instant case. The petitioner initially points out in its reasons for granting the writ that the court of appeals *seemingly* accepted the State defendants' claim that they had fairly relied on legal advice that they had no alternative in dealing with the Prince William County Jail but to approach the local circuit court, and that in any event overcrowding was so epidemic that it would have not have possible to assist Prince William. (Petition for Certiorari, p.9). The petitioner characterizes the decision of the court of appeals as in *apparent* agreement that communication with the state court was the only action that the respondents could have taken to limit overcrowding in the jail. (Petition for Certiorari, p.9). However, petitioner argues before this Court that there was manifest evidence that other options were available.

It is clear that the petitioner does not agree with the resolution by the jury of these issues adversely to him. However, as is indicated above, the petitioner's disagreement with factual determinations made by the jury is not a basis for granting certiorari. These issues were fairly presented to the jury and to the court of appeals and they have been consistently resolved against the petitioner. What he now seeks is a third bite at the apple before this Court. He has, however, had every opportunity to convince the trier of fact of his position, but he has failed at every turn.

Another example of the petitioner's complaint about the findings made by the jury in the instant case is his assertion

that the jury, as well as the court of appeals, "*appears* to have accepted testimony that the Department of Corrections has transferred some persons from the jail, but could not transfer more without overburdening other local facilities in the state penitentiary." (emphasis supplied.) The petitioner contends, however, that "the evidence was, more properly, that the respondents simply did not pursue any other available course . . ." (Petition for certiorari pp.9-10) Again, the petitioner complains that the jury chose to believe the evidence of the State defendants and not that the County defendants. This is merely another attempt to relitigate factual determinations made at the trial by the jury in this forum.

The petitioner next points to another area where the jury allegedly ignored evidence of other options available to the State defendants to alleviate overcrowding in the Prince William Jail. The plaintiff asserts that between 1980 and 1982 the State defendants could have transferred Prince William inmates to other institutions where space was available. The jury could also and did, however, choose to believe the evidence adduced by the State defendants that both the Board and the Director of the Department of Corrections consulted counsel about this option and were reasonably advised that it was not viable. Again, petitioner seeks to have this Court substitute its judgment for that of the jury in determining the reasonableness of the State defendants' actions. All of plaintiff's factual arguments concerning the options available to the Department and to the Board of Corrections were made to the jury in the trial of this case in the district court and rejected. The petitioner is simply not entitled to a relitigation of these issues before this Court.

CONCLUSION

This court has ruled: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). The entire premise of the County's petition is that given the "facts" no one could have properly concluded that the State was entitled to a good faith defense. However, absent the most exceptional circumstances, this Court will accept factual determinations in which a district court and a court of appeals have concurred. *Branti v. Finkel*, 445 U.S. 507 (1980). In the case at bar the jury resolved the good faith issue and the facts attendant to it adversely to the County. This petition is nothing more than a request to this Court that it find what two previous courts who have reviewed the lengthy trial record have been unable to find—an absence of good faith either objectively or subjectively. Certiorari should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alan Katz, Assistant Attorney General of Virginia, Counsel of Record for the Respondent in the captioned matter, and a member of the Bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing Brief in Opposition for Writ of Certiorari were mailed, first class, postage prepaid, to John H. Foote, 9380 F. Forrestwood Lane, Manassas, Virginia 22110 on or before June 15, 1984.

ALAN KATZ
Assistant Attorney General

APPENDIX A

A-1

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action 81-1049-AM

CRAYTON E. McELVEEN, JR. *et al.*,

Plaintiffs,

v.

COUNTY OF PRINCE WILLIAM, *et al.*

Defendants.

ORDER

This matter comes before the court on the cross-claim of defendants County of Prince William, members of the Board of Supervisors of the County of Prince William, and the Sheriff of the County of Prince William against defendants T.D. Hutto, Director of the Virginia State Department of Corrections, and members of the Virginia State Board of Corrections. For reasons stated in the accompanying memorandum, the court **ORDERS** judgment entered in favor of T.D. Hutto and the members of the Virginia State Board of Corrections insofar as the cross-claim requests that Hutto and members of the Board of Corrections be held liable for any monetary judgment rendered against the County, the members of the County Board, and the Sheriff of the County. Insofar as the cross-claim prays for equitable relief, the court takes the cross-claim under advisement.

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Let the Clerk send a copy of this order and the accompanying memorandum to all counsel of record.

/s/ RICHARD L. WILLIAMS

Richard L. Williams
United States District Judge

DATE: June 23, 1982

[Text of memorandum accompanying the preceding order denying County cross-claim]:

MEMORANDUM

This matter comes before the court on the cross-claim of defendants County of Prince William, members of the Board of Supervisors of the County of Prince William, and the Sheriff of the County of Prince William ("the County defendants") against defendants T. D. Hutto, Director of the Virginia State Department of Corrections, and members of the Virginia State Board of Corrections ("the State defendants"). For reasons stated below, the court orders judgment entered in favor of the State defendants, insofar as the cross-claim requests that the State defendants be held liable for any monetary judgment rendered against the County defendants.

During the trial before the jury, the court dismissed the State defendants in their official capacities from the case, on eleventh amendment grounds. The State defendants remained in the case in their individual capacities. The jury returned a verdict against the County defendants and in favor of the State defendants. The court subsequently denied County defendants' and plaintiffs' motions for judgment notwithstanding the verdict as to the State defendants under Fed. R. Civ. P. 50(b)(1).

The immunity afforded by the eleventh amendment to the State defendants in their official capacities does not apply to them in their individual capacities. The jury could have returned a verdict against the State defendants in their individual capacities but did not do so. Granting relief to the County defendants via their cross-claim would have the same effect as granting relief to them via their motion for judgment notwithstanding the verdict. The issues presented

to the jury regarding allocation of liability as between the County and State defendants are no different than the ones now presented to the court by the vehicle of the County defendants' cross-claim. The court can see no more reason to nullify the verdict of the jury via the cross-claim than via the motion for judgment *n.o.v.* Hence the court will order judgment entered in favor of the State defendants as to the cross-claim, and leave the jury verdict undisturbed.

An appropriate order accompanies this memorandum.

/s/ RICHARD L. WILLIAMS

Richard L. Williams
United States District Judge

DATE: June 23, 1982

APPENDIX B

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§ 53-135. Any court of record having general chancery jurisdiction in any county or city which maintains and operates any such jail, jail farm or lockup, or in any county in which is situated any town which maintains and operates any such jail, jail farm or lockup, affected by any such order of the Board, shall have jurisdiction to enforce such order by an injunction or other appropriate remedy at the suit of the Board. In the city of Richmond such jurisdiction shall be vested in the Hustings Court of the city. Such proceeding shall be commenced by a petition of the Board at the relation of the Commonwealth and shall, insofar as possible, conform to rules of procedure applicable to chancery practice. The governing body of each county, city or town, which maintains and operates any jail, jail farm or lockup affected by the order of the Board, and the officer in charge of each such jail, jail farm or lockup affected, shall be made parties defendant. In every such proceeding the court shall hear all relevant evidence bearing upon the propriety of the Board's action, and may, in its sound discretion, refuse to grant the injunction if it appears that the action of the Board was not warranted.

§ 53-134. The Board is authorized to prohibit, by its order, the confinement of prisoners in any jail or lockup, or at any jail farm, which is not constructed, equipped, maintained and operated so as to comply with minimum standards prescribed by the Board in accordance with the provisions of § 53-133, and to designate some other jail, jail farm, lockup, or place of detention in or at which shall be confined all persons who otherwise would have been confined in the jail, jail farm, or lockup thus ordered closed by the Board. . . .

§ 53.19.17. The Director is authorized to transfer, or to require to be transferred, any person accused or convicted

of an offense against the laws of the Commonwealth of Virginia or of any other state or country or any offense in violation of any city, town or county ordinance within the Commonwealth, or any witness held in any case to which the Commonwealth is a party, if confined in any penal institution within the Commonwealth, from any penal institution in which such person is confined to such other penal institution in the State as is designated by the Director.

§ 19.2-310. Every person sentenced by a court to confinement in the State penal system upon conviction of a felony shall be conveyed to an appropriate receiving unit operated by the Department of Corrections in the manner hereinafter provided. . . . Under no circumstances shall persons be conveyed to the receiving unit or units of the State penal system beyond the maximum capacity of the unit or units as established by the Director; in this regard, the Director or his designee shall allocate space available in the receiving unit or units by giving first priority to the transportation, as the transportation facilities of the Department of Corrections may permit, of those persons held in jails who in the opinion of the Director or his designee require immediate transportation to a receiving unit.

§ 53-129. When it shall appear to the circuit court of any county or the corporation court of any city that there is no jail therein, or when it appears to such court, from the report of persons appointed to examine the jail or otherwise, that the jail of such county or city is insecure or out of repair, or otherwise insufficient, it shall be the duty of such court to award a rule, in the name and on behalf of the Commonwealth against the governing body of the county, or the governing body of the city, as the case may be, to show cause why a peremptory mandamus should not issue, commanding them to erect a jail for the county or city, or

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to cause the jail of such county or city to be made secure, or put in good repair, or rendered otherwise sufficient, as the case may be, and to proceed as in other cases of mandamus, to cause the necessary work to be done.